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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOHN DENTON SIMPSON, JR., Defendant and Appellant.	A125017 (Humboldt County Super. Ct. No. CR081509)

I.

INTRODUCTION

Appellant John Denton Simpson, Jr., appeals from the judgment and sentence imposed by the trial court, contending he should be allowed to withdraw his guilty plea. We conclude that there was no abuse of discretion in the trial court's decision to deny his motion to withdraw his plea, nor was there a breach or violation of his plea agreement by the prosecutor compelling that relief. Accordingly, we affirm.

II.

PROCEDURAL BACKGROUND

The Humboldt County District Attorney filed an eight-count information charging appellant with the following crimes: one count of sale or transportation of an assault weapon (Pen. Code,[1] § 12280, subd. (a)(1)), four counts of being a felon in possession of a firearm (§ 12021, subd. (a)(1)), one count of being a felon in possession of ammunition

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

(§ 12316, subd. (b)(1)), one count of possession of a dangerous weapon (§ 12020, subd. (a)(1)), and one count of fleeing a pursuing police officer (Veh. Code, § 2800.2, subd. (a)). The information also alleged that appellant had suffered a prior serious or violent conviction, within the meaning of section 667, subdivisions (d) and (e), and section 1170.12, subdivisions (b) and (c), and one prior felony conviction for which he served a prison term within the last five years (§ 667.5, subd. (b)).

Trial commenced on November 17, 2008. Prior to jury selection, appellant admitted the two prior convictions allegations, and the trial court found that appellant's admissions were knowingly, intelligently, freely, and voluntarily made. The next day, November 18, appellant indicated that he wished to enter a plea of guilty to all counts, and that he wished to admit the special allegations. Appellant was advised that he faced a 25-year maximum sentence if he went to trial and was found guilty. As part of the negotiated plea, appellant was advised that he could receive a maximum sentence of 17 years in state prison, "or possibly less depending on other circumstances as they develop between [the time of the plea] and the time of sentencing." In accepting the plea, the trial court found that appellant was in full possession of his faculties and that his waiver of rights was free and voluntary. The court also found that appellant understood the consequences of his plea.

On March 16, 2009, defense counsel indicated that a motion to withdraw appellant's plea would be filed. The motion and opposition were heard on March 30 and denied. Immediately thereafter, the court sentenced appellant to an aggregate state prison term of 16 years, calculated at follows: the aggravated term of eight years for count one was selected as the principal term which was doubled to 16 years based on the special allegation (§ 1170.12). The sentences of all other counts were either stayed (§ 654) or were imposed to run concurrent with the principal term. Appellant was awarded custody credits totaling 588 days.

Appellant then made a request for a certificate of probable cause, claiming he was entitled to plea withdrawal on the basis of a breach of the plea agreement. The request was granted on May 18, 2009.[2] This appeal followed.

III.

ANALYSIS

A. Facts Relating to Appellant's Plea and Withdrawal Motion

On November 18, 2008, the second day of trial, the court indicated its understanding that there had been ongoing negotiations regarding a possible plea, and that the parties had reached a "possible" resolution of the case by which appellant would plead to all counts in the information "in exchange for a 17-year cap. That would be, in other words, the top, that depending on the circumstances, there may be a lesser sentence imposed. That would be up to the District Attorney as far as input and ultimately up to the Court, but, of course, the Court can go for the 17." Appellant indicated he wanted to talk more to his lawyer about the proposal, and the court ordered a recess until 2:00 p.m. that day.

When court reconvened, appellant's counsel, Mr. Clanton, advised the court that there would be a plea entered in the case. Appellant asked for a second to confer with his counsel, and the two did so privately.

After the short break, counsel began by stating he had advised appellant "that it is difficult but not impossible at this point to indicate what the actual sentence may be based upon the circumstances that were discussed earlier." The court stated, "Well, other than it won't be anything more than 17 years." Counsel then informed the court that was what appellant had been told. The court advised appellant of the rights he was waiving by entering the plea, and then stated, "As you know, the maximum that [*sic*] under the negotiated plea here would be 17 years, and it could be less than that depending on other

[2] The request for a certificate of probable cause also included an assertion that the trial court erred in denying appellant's pretrial motion to sever some counts. However, appellant does not raise this second ground on appeal.

circumstances as they develop between now and the time of sentence." Appellant indicated that he understood this.

Shortly thereafter, the court asked appellant to state whether any threats or promises had been made to him to get him to plead guilty. The following colloquy occurred:

"THE COURT: Okay. [¶] With regard to the promises, of course, you've been promised that it's not going to be over 17 years, and that it could be less than that.

"[APPELLANT]: Considerably less.

"THE COURT: Right. That depends on a number of different things.

"[APPELLANT]: On me.

"THE COURT: On you as well as on me.

"[APPELLANT]: Uh-huh.

"THE COURT: And the District Attorney. [¶] But other than that, have there been any other promises made I don't know anything about and you haven't mentioned?

"[APPELLANT]: No. Just what we talked about.

"THE COURT: Okay. . . ."

The prosecutor did not make any comment about the terms of the plea during the hearing, or about what her position would be concerning the length of sentence. The court proceeded to take appellant's guilty plea on each count, and to accept appellant's admissions as to the special allegations. The matter was continued to January 23, 2009 for sentencing.

Before the sentencing hearing, appellant's counsel, Mr. Clanton, requested a closed hearing to discuss a potential conflict of interest that had arisen since the time of the plea. Counsel advised the court in the closed hearing that he was concerned that during appellant's future discussions with law enforcement officials about his knowledge of other criminal activity in the community, appellant might identify individuals represented by Mr. Clanton. In the course of the discussion about the potential conflict of interest, counsel referred to the plea as a "conditional plea." Counsel described the "condition" that there be "good faith discussions regarding [appellant's] potential for

cooperation and thus mitigating his sentencing, the years that he might receive at sentencing."

Mr. Clanton then indicated that he had concern that the prosecutor might not go forward with "their part of the bargain" because of appellant's perceived lack of credibility. However, he advised the court that this concern "[t]o some degree, that has been remedied" in that appellant, through counsel, had met with the FBI and drug task force personnel. The court then appointed another attorney to act as co-counsel unless or until the potential conflict either ripened into an actual conflict, or the issue was resolved. The court said nothing at this hearing concerning its understanding of the plea agreement.

A sentencing hearing was to be held on March 16, 2009. At that time, appellant was represented both by Mr. Clanton and conflict counsel, Mr. Hapgood. Mr. Clanton advised the court at the beginning of the hearing that he intended to file a motion to withdraw appellant's plea because, in his opinion, the prosecution had failed to proceed in good faith in adhering to the terms of the plea agreement. Mr. Clanton then described his understanding that appellant was going to provide law enforcement with information about other criminal activity in the community, which he had done, and law enforcement had failed to act on the information.

The prosecutor, Ms. Fleming, spoke of the information obtained from appellant. She indicated that prior to appellant's plea some information had been provided by appellant relating to another defendant whose case was pending. She spoke to the deputy prosecutor handling that matter and concluded that the information appellant had provided did not merit any reduction in his sentence. When Mr. Clanton was told this on the day of appellant's plea, he asked if the prosecutor would give appellant "a break" if he told law enforcement where a large quantity of methamphetamine could be found. It was based on that prospective information that Ms. Fleming agreed to the 17-year maximum sentence.

Ms. Fleming told the court: "But I believe I made it very clear to counsel. And when we talked about this at the bench, my view was it would be a 17-year term . . . but obviously the Court was able to select whatever term the Court felt was appropriate."

The judge responded, "I remember you saying that you were going to argue for the 17-year term."

The prosecutor then related that since the plea was entered, information had been forthcoming from appellant. However, the information was not sufficient to support a search warrant, law enforcement was already aware of some of the information, and some of the information had been "leaked" to the implicated individuals which was "compromising the value of the information and, frankly, putting the law enforcement officers at high risk." The court indicated that the case would be continued again to enable Mr. Clanton to file a motion to withdraw the plea, if he wished to do so.

Appellant filed a written motion to withdraw his plea arguing that he had been induced to enter his plea based on the prosecution's false promise that appellant's "good faith cooperation in relating the details of ongoing and past criminal activity would be reciprocated by a commensurate reduction from the 17-year cap he negotiated." The moving papers outlined in detail the information appellant asserts he provided to law enforcement after entering his plea.[3] In opposition to the motion, the prosecutor disputed the quality and quantity of the information provided by appellant.

On March 30, 2009, a hearing was held on appellant's motion to withdraw his plea. In connection with the motion, appellant's counsel recounted the meetings he and appellant had with law enforcement subsequent to entering his plea, and noted again that the only reason appellant entered his plea "was because he expected that the quality of information he had would result in a reduction." He then outlined the circumstances that led counsel to conclude that the prosecution and law enforcement did not proceed in good faith in fairly evaluating the quality and amount of information provided, and in considering a reduction in sentence based on that evaluation. Later during his argument,

[3] The motion and opposition have been filed under seal because of the confidential nature of the information appellant discussed with law enforcement described in the papers. For this same reason, we granted appellant leave to file a redacted brief on appeal. We have omitted describing the confidential information in detail because it is unnecessary to our analysis, thus preserving its confidentiality.

counsel explained his understanding of the negotiated plea was that if appellant provided information to law enforcement "it would translate into a reduction in the amount of years he would receive pursuant to the quality of the information, which is entirely fair." The following exchange then occurred:

"THE COURT: That was not the agreement.

"MR. CLANTON: Well, with all due respect to the Court, that's what I understood the agreement to be.

"THE COURT: It was always up to the judge. The People could argue for a lesser sentence, but it was up to the judge.

"MR. CLANTON: That is true. With that explanation, I agree with the Court."

Defense counsel then went on to argue that law enforcement failed to follow up on the information given by appellant or to evaluate it properly, thus making it impossible for the court to give due consideration to appellant's cooperation in arriving at an appropriate sentence.

In rebuttal, the prosecutor explained her understanding of what information had been provided by appellant about other crimes and why it was not as valuable as defense counsel suggested. Counsel then explained again her understanding of the plea deal: "I had made it clear all along that the offer was 17 years, ultimately a 17-year cap with me providing information to the Court for the Court to consider. Frankly, that's been done through all of these writings."

Counsel continued to argue back and forth about what specific information had been provided, and what law enforcement did or did not do with it. At the conclusion, the prosecutor admitted that some of the confidential information she described at the hearing had been useful, and she "want[ed] the Court to be aware [of] [that] because the Court can certainly consider that in deciding if he should get a reduction from the People's cap."

The court denied appellant's motion to withdraw the plea, explaining: "That doesn't mean the Court's not going to take into consideration the efforts on behalf [of]

your client in order to assist law enforcement. It just means I'm not going to give him his plea back."

Prior to sentencing, defense counsel again referred to the information provided by appellant, and argued that it "should motivate the Court to give him a significant reduction in the term he's exposed to." The prosecutor argued for a full 17-year sentence, which was consistent with the probation department's recommendation.

As noted earlier in this opinion, instead of imposing the full 17-year maximum sentence, the court sentenced appellant to an aggregate term of 16 years in state prison, less custody credits. The aggravated term for count one was selected by the court because appellant had served two prior prison terms, and had violated the terms of parole eight times.

B. Standard of Review

Penal Code section 1018, states in part: "On application of the defendant at any time before judgment or within six months after an order granting probation is made if entry of judgment is suspended, the court may, and in case of a defendant who appeared without counsel at the time of the plea the court shall, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted."

" 'While . . . section [1018] is to be liberally construed and a plea of guilty may be withdrawn for mistake, ignorance, or inadvertence or any other factor overreaching defendant's free and clear judgment, the facts of such grounds must be established by clear and convincing evidence.' " (*People v. Urfer* (1979) 94 Cal.App.3d 887, 892.) The burden is on the defendant to present clear and convincing evidence the ends of justice would be served by permitting a change of plea to not guilty. (*People v. Beck* (1961) 188 Cal.App.2d 549, 553.) "Guilty pleas resulting from a bargain should not be set aside lightly and finality of proceedings should be encouraged." (*People v. Hunt* (1985) 174 Cal.App.3d 95, 103.)

When a defendant is represented by counsel, the grant or denial of an application to withdraw a plea is purely within the trial court's discretion after considering all of the factors necessary to bring about a just result. (*People v. Harvey* (1984) 151 Cal.App.3d

660, 666-667; *People v. Urfer*, *supra*, 94 Cal.App.3d at pp. 891-892; *People v. Cruz* (1974) 12 Cal.3d 562, 566.) On appeal, the trial court's decision will be upheld unless there is a clear showing of abuse of discretion. (*People v. Harvey*, *supra*, at pp. 666-667; *People v. Urfer*, *supra*, at pp. 891-892; *In re Brown* (1973) 9 Cal.3d 679, 685.) An abuse of discretion is found if the court exercises discretion in an arbitrary, capricious or patently absurd manner resulting in a manifest miscarriage of justice. (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

C. Discussion

Appellant argues on appeal, as he did below, that his plea agreement included an express term that his cooperation with law enforcement "would lead to a considerable reduction of his sentence." This is not an accurate portrayal of the terms of the negotiated plea as appears on this record. Appellant was advised and acknowledged his understanding that he faced a sentence of up to 17 years in state prison and no higher. It was also explained that if he provided information to law enforcement about other crimes, the trial judge *could*, not *would*, reduce his sentence.

Certainly by the time the motion to withdraw appellant's plea was decided, the trial judge had detailed knowledge about the quantity and quality of information provided by appellant to law enforcement, as well as the parties' opposing views regarding the extent to which this information proved to be useful. Under these circumstances, it was for the trial judge to determine to what extent appellant's cooperation with law enforcement merited a sentence reduction, *if any*.

Moreover, the trial judge indicated that he would take appellant's cooperation with law enforcement into consideration in sentencing and did so. While not as "considerable" a reduction as appellant had hoped for, he did receive a 16-year sentence rather than a 17-year sentence (a 6 percent reduction). He does not contend that the sentence actually imposed was an abuse of the court's sentencing discretion.

Even if there was no breach of the plea agreement, appellant alternatively argues that it was an abuse of discretion, and a violation of his right to due process, not to allow him to withdraw his plea because he entered into it with the mistaken understanding that

he "would" receive a "considerable" reduction to his sentence based on the information he intended to impart to law enforcement.

The trial court was not bound to conclude that this was actually appellant's expectation. Firstly, there was no reasonable basis for such a belief. There was nothing said at sentencing that could lead appellant reasonably to conclude that he had an automatic entitlement to a reduced sentence, regardless of the quantity or quality of the information he would provide to law enforcement. Instead, appellant was consistently advised that the court reserved the ability and power to sentence appellant to the 17-year "cap" to which he agreed. Also, in considering appellant's motion to withdraw his plea, the trial court was not bound by appellant's characterization of his subjective understanding of the terms of the plea agreement because "in determining the facts, the trial court is not bound by uncontradicted statements of the defendant." (*People v. Hunt, supra,* 174 Cal.App.3d 95, 103; *People v. Brotherton* (1966) 239 Cal.App.2d 195, 201.) In exercising its discretion, the trial court was entitled to conclude that appellant fully understood the effect of his plea; however, when a significantly reduced sentence did not appear likely, he sought to renege on the bargain he had struck.

As noted in *Brady v. United States* (1970) 397 U.S. 742: "Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." (*Id.* at pp. 756-757.)

Lastly, we reject appellant's related claim that the prosecution violated section 1018 and his right to due process based on fraud or breach of promise. In this regard, appellant charges that the prosecutor had no intention of honoring a "promise" that his cooperation with law enforcement would lead to a considerable reduction in his sentence. He also argues bad faith on the part of the prosecutor because "[i]f the prosecutor had acted in good faith . . . she would have ensured that law enforcement followed up on the leads appellant provided." Because she did not do so, "there was no way for the sentencing judge to evaluate the quality of the information appellant provided."

As to the former claim, there is nothing in the record to indicate that the prosecutor agreed to argue for anything lower than the 17-year maximum sentence. In fact, the record supports the opposite conclusion. At the March 16, 2009 hearing, both the prosecutor and the court recalled that the prosecutor said she would argue for the 17-year maximum sentence regardless of the information appellant gave to law enforcement.

Similarly, as to the second point, there is nothing placed on the record with respect to the plea agreement that would indicate the prosecutor was required to move forward on any information appellant disclosed. Also, as we have already observed, both parties presented extensive argument outlining their respective views on the quantity and quality of the information provided by appellant to law enforcement. Therefore, the trial court was well-informed about appellant's cooperation, and whether, or to what extent, the information was or was not helpful to law enforcement.

For these reasons, this case is not at all similar to *Santobello v. New York* (1971) 404 U.S. 257, a case heavily relied on by appellant to support his due process claims. In *Santobello*, at the time the defendant's guilty plea to a lesser included offense was put on the record, the prosecutor stated that no recommendation would be made regarding the sentence. However, at sentencing a different deputy prosecutor appeared and argued for

the maximum sentence, which the trial judge imposed.[4] (*Id.* at pp. 259-260.) This change in position regarding sentencing represented a clear violation of the plea agreement. No such violation occurred here.

Appellant also asserts that he was "misadvised" by his counsel about the promised sentence and that he would not have entered a guilty plea if he had been given the correct information. A defendant's self-serving statement that he would not have pleaded guilty if properly advised must be corroborated independently by objective evidence, which is absent here. (*In re Resendiz* (2001) 25 Cal.4th 230, 253 abrogated on another ground in *Padilla v. Kentucky* (2010) 130 S.Ct. 1473, 1484; *In re Alvernaz* (1992) 2 Cal.4th 924, 938.) To the extent appellant's argument can be read as claiming that he was provided ineffective representation, it is not fully reviewable on appeal because it involves factual matters (i.e., counsel's statements to him) that do not appear in the trial record. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

IV.

DISPOSITION

The judgment is affirmed.

_____
Ruvolo, P.J.

We concur:

_____
Sepulveda, J.

_____
Rivera, J.

[4] The trial judge stated that he or she was uninfluenced by the recommendation. Nevertheless, the United States Supreme Court remanded to the state court to consider either specifically performing the plea agreement, or allowing the defendant to withdraw his plea. (*Santobello v. New York, supra,* at pp. 259, 262-263.)